



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 6, 1995

Mr. Robert W. Gee
Chair
Public Utility Commission of Texas
7800 Shoal Creek Boulevard
Austin, Texas 78757

Letter Opinion No. 95-043

Re: Whether provisions of the Texas Open Records Act, Government Code chapter 552, prohibit the Public Utility Commission from publishing a report to the legislature on the scope of competition in the telecommunication market (ID# 25361)

Dear Mr. Gee:

You have asked this office for an opinion concerning a report that the Public Utility Commission (the "commission") is required to provide to the state legislature regarding the scope of competition in the telecommunication market. You explain that the commission plans to distribute the report to the public, and ask whether certain provisions of the Texas Open Records Act (the "act"), Government Code chapter 552, prohibit the commission from doing so. Specifically, you are concerned that sections 552.101, 552.104, and 552.110 may prevent the commission from providing the information to the legislature and to the public at large.

The commission is authorized by law to monitor the competitiveness of telecommunication utilities throughout the state. V.T.C.S. art. 1446c, § 18(a), (c)(2). In addition, the commission must report to the legislature on a biennial basis the scope of competition in the telecommunication markets. *Id.* § 18(k), (p). Section 18(k) of article 1446c provides in relevant part that

[t]he report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years that reflect changes in the scope of competition in regulated telecommunications markets.

Section 18(p) contains virtually identical language to that found in section 18(k).

Pursuant to this legislative mandate, the commission has ordered telecommunication utilities that are under its jurisdiction to submit specific information to the commission to be utilized in the next biennial report to the legislature. *See also id.* § 28(a) (defining commission's power under "ARTICLE V. RECORDS, REPORTS, INSPECTIONS,

RATES AND SERVICES" to require reports from public utilities under its jurisdiction). The commission has ordered the telecommunication utilities to provide, among other things, information concerning revenues, number of business customers, and number of residential customers for each service that the utility provides. The utilities are required to provide the information by county population group, that is, services provided to counties with population over 500,000; counties with population between 20,000 and 500,000; or counties with population under 20,000. Order to Interchange Telecommunications Carriers, Project No. 12202, at 7 (Pub. Util. Comm'n of Tex.) (Jun. 9, 1994).

We note that section 13 of article 1446c, V.T.C.S., addresses the public nature of reports required to be submitted to the commission by utilities subject to its jurisdiction. Section 13 provides in relevant part that

[a]ll files pertaining to matters which were at any time pending before the commission and to records, reports, and inspections required by Article V hereof shall be public records, subject to the terms of the [act].

The language of this provision clearly indicates that reports that are required to be filed by telecommunication utilities pursuant to article V are treated as public records. However, these records are subject to the provisions of the act that may, in some instances, prevent disclosure of the reports. We now address the provisions you raise that may be applicable in this matter.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987). The information requested from the telecommunication utilities does not relate to a competitive bidding situation or commercial transaction to which the commission is party. Accordingly, section 552.104 is inapplicable to the information at issue here.

You assert that the information may be excepted from disclosure by section 552.101 as information considered confidential by statutory, judicial or constitutional law. You do not explain, nor is it apparent after a review of the relevant statutory provisions governing this information, that the information to be contained in the report is made confidential by statutory or constitutional law. Because section 552.110 also encompasses the common law, we will consider the applicability of section 552.101 with section 552.110. See Open Records Decision No. 592 (1991).

Section 552.110 excepts from public disclosure either (1) trade secrets or (2) commercial or financial information obtained from a person and privileged or confidential

by statute or judicial decision. This exception protects the property interests of third parties recognized by the courts. Open Records Decision Nos. 494 (1988); 319 (1982). The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business.* Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).¹

The second prong of section 552.110 protects commercial or financial information obtained from a person that is confidential by law. In Open Records Decision No. 592, this office re-examined the second prong of section 552.110 and concluded that information may be withheld under this prong if it is "privileged or confidential" under the common or statutory law of Texas. Other than the type of information that may be

¹The following criteria determine whether information constitutes a trade secret:

- (1) the extent to which the information is known outside [the owner's] business;
- (2) the extent to which it is known by employees and others involved in [the owner's] business;
- (3) the extent of measures taken by [the owner] to guard the secrecy of the information;
- (4) the value of the information to [the owner] and to his competitors;
- (5) the amount of effort or money expended by [the owner] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

considered a trade secret, the information at issue in the report is not "privileged or confidential" under the common or statutory law of Texas.

Several of the telecommunication utilities that were required to provide information to the commission have contacted this office with concerns that the information is proprietary in nature and must be protected from public disclosure under section 552.110 as either trade secret or commercial or financial information.² We believe that such concerns are valid given the commission's mandate "to provide equal opportunity to all telecommunications utilities in a competitive marketplace." V.T.C.S. art. 1446c, § 18(a). As indicated above, however, that the Public Utility Regulatory Act ("PURA") does not contain a confidentiality provision that prohibits the disclosure of this type of information that is required to be provided to the commission by telecommunication utilities. Therefore, the only provision of law that may prohibit its disclosure would be section 552.110 of the Government Code.

We conclude that the commission may structure the report so that it may disclose the report to the public without implicating the proprietary interests of the entities that were required to provide the information on which the report is based. We believe that the commission may do so as long as it avoids explicitly or implicitly identifying any of the responding utilities.

We have reviewed the final report that the commission made available to the public in January 1995. The report is structured to avoid identifying individual utilities when discussing information that may be proprietary in nature and that was submitted by telecommunication utilities in response to the commission orders. If a particular utility is identified, it does not appear to be in relation to any information submitted in response to the commission orders that may be protected under section 552.110 of the Government Code.³ Therefore, we conclude that the commission can meet its legislative mandate

²The orders from the commission required each responding utility to note in its response to the commission what information the utility considered to be confidential or proprietary in nature, citing the applicable provisions of the act. In its orders to the utilities requesting the information, the commission stated that "[i]nformation labeled confidential . . . will be treated as such by the Commission, subject to the provisions of the [Open Records] Act, and will be kept in a locked file cabinet with access restricted to Commission personnel working on this Project." We note that the commission may not agree to keep information confidential except where specifically authorized to do so by statute. See, e.g., Open Records Decision Nos. 444, 437 (1986). You do not cite, nor are we aware of, any statute that permits the commission to enter into an agreement to keep the information confidential.

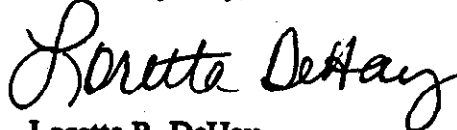
³We note that Exhibit 3 of the report contains company specific information regarding the number of access lines held by local exchange companies as of December 1, 1993. Local exchange carriers are required to report annually to the commission the total number of access lines as of December 31 of the previous year. 16 T.A.C. § 23.56(f). We understand that this information is normally treated as a public record by the commission. Moreover, the companies that responded to a letter from our office regarding the issues presented in this opinion request did not address the proprietary nature, if any,

under sections 18(k) and (p) of article 1446c of PURA and avoid implicating section 552.110 of the Government Code by providing a final report similar to the report we have reviewed.

S U M M A R Y

The Public Utility Commission may publicly disclose a report regarding the scope of competition in the telecommunication market without implicating the proprietary interests of the entities that were required to provide the information on which the report is based. The commission may do so as long as it avoids explicitly or implicitly identifying any of the responding utilities.

Yours very truly,

A handwritten signature in cursive script, reading "Loretta DeHay".

Loretta R. DeHay
Assistant Attorney General
Opinion Committee

(footnote continued)

of this type of information. Thus we do not believe that the total number of access lines held by a particular entity is the kind of proprietary information that may be excepted by section 552.110.